87-170

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

WILLIAM COPLEY, *et al.*,
Appellants,

vs.

HEIL-QUAKER CORP., *et al.*,
Respondents.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

JAMES T. MURRAY, *Counsel of Record*
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorney for Appellants

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether the Interstate Commerce Clause constitutionally prohibits a state from enacting legislation denying benefits of the state's statute of limitations to foreign corporations and others having no presence in the state and, if so, may such determination by a federal court be applied retroactively as grounds for summarily dismissing an otherwise timely commenced cause of action.

PARTIES

Present Appellants are: William Copley, Patsy Copley, his wife, and Dale Copley, their son. All were parties in all actions below.

Present Respondents are Heil-Quaker Corporation, Honeywell, Inc., Sears, Roebuck & Company, Frey & Sons and Phillips Bottled Gas Company.

Anthony Celebrezze, Jr., the Attorney General of the State of Ohio, is being included as a respondent pursuant to the Rule 28.4(c) of the Rules of the Supreme Court of the United States. This is a proceeding wherein the constitutionality of a statute of the State of Ohio has been drawn in question. The lower courts did not, pursuant to 28 U.S.C. Section 2403(b), certify to the Attorney General of the State of Ohio the fact that the constitutionality of Ohio Revised Code Section 2305.15 was drawn in question.

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No.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit below has not been reported. The case is *Copley, et al. v. Heil-Quaker Corp., et al.*, No. 86-3360 (6th Cir. May 20, 1987). The Memorandum and Order of the Federal District Court for the Northern District of Ohio dismissing Heil-Quaker Corp. as a defendant has also not been published. *Memorandum and Order, Copley, et al. v. Heil-Quaker Corp., et al.*, No. 82-512 (N.D. Ohio. March 8, 1984). Both opinions are included in the appendix.

JURISDICTION

The Copleys invoke the Court's appellate jurisdiction under 28 U.S.C. Section 1254(2) because a federal court of appeals has held an Ohio statute invalid. Alternatively, if this Court were to determine that it does not have appellate jurisdiction, the appellants invoke this Court's certiorari jurisdiction under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the United States Constitution (the Commerce Clause) provides, in relevant part, as follows:

> "The Congress shall have Power
>
> . . .
>
> to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ." United States Constitution, Article I, Section 8.

28 U.S.C. Section 1254(2) provides in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . .
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . ." 28 U.S.C. Section 1254 (1982).

The state statute attacked by Heil-Quaker Corp. upon which the Copleys relied for the proposition that their

original complaint was timely filed is Ohio Revised Code Section 2305.15 which provides, in relevant part, the following:

> "When a cause of action accrues against a person if he is out of state, or has absconded, or conceals himself, the period of limitations for the commencement of the action . . . does not begin to run until he comes into the state or while he is so absconded or concealed." Ohio Revised Code Section 2305.15 (Page, 1987).

It is this statute which the Court of Appeals for the Sixth Circuit found to be an unconstitutional restriction on interstate commerce in the opinion below.

STATEMENT OF THE CASE

On August 24, 1982, William, Patsy and Dale Copley (hereinafter referred to simply as "the Copleys") commenced an action in the United States District Court for the Northern District of Ohio. The action was commenced for indisputable and admittedly serious injuries. The Copleys' injuries were inflicted on December 12, 1975 when the furnace servicing the Copley residence exploded.

The Copley furnace was manufactured by the defendant, Heil-Quaker Corporation (hereinafter referred to simply as "Heil"). Neither the furnace itself nor any accompanying literature identified Heil as the manufacturer of the furnace.

Heil is a Delaware corporation which manufactures furnaces in Tennessee. The furnace was sold in Ohio and other states of the Union. The purely interstate character of Heil's commercial activities in the State of Ohio was not and is not disputed.

No one disputes that the Copleys' cause of action was timely commenced pursuant to Ohio Revised Code Ann. Section 2305.15 (hereinafter referred to simply as the "Ohio Savings Statute").

The Ohio Savings Statute provides that limitation periods otherwise applicable to Ohio causes of action are tolled as to foreign corporations and other defendants that have no presence in the State of Ohio or are otherwise not amenable to service within the State of Ohio.

Notwithstanding the otherwise timely commencement of the Copleys' action, the Federal District Court, upon motion by Heil, summarily dismissed the action against Heil. The Federal District Court found that the Ohio Savings Statute was unenforceable because it created a constitutionally impermissble burden on interstate commerce.

On May 20, 1987, the Sixth Circuit Court of Appeals affirmed the Federal District Court and the within appeal was taken pursuant to 28 U.S.C. Section 1254(2).

REASONS WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO REQUIRE PLENARY APPELLATE CONSIDERATION

I. The United States Supreme Court has already ruled that the question is substantial. G. D. Searle & Company v. Cohn, 455 U.S. 404 (1982).

In *Searle*, 455 U.S. 404[1], this Court was confronted with the identical issue raised herein. In their complaint, the Cohns had claimed injuries as a result of a drug manufactured by G. D. Searle Company and sold to plaintiffs in New Jersey. G. D. Searle Company's activities in New Jersey were strictly interstate in character.

The Cohns failed to commence their cause of action for nine (9) years after their injuries were incurred. The New Jersey statute of limitations requires claims for personal injuries to be commenced within two (2) years of the alleged injury. The Cohns nevertheless claimed timely commencement of their action under New Jersey's tolling statute which, like the Ohio Savings Statute, tolls all statutes of limitation as to defendants who are not present or otherwise amenable to service within the state.

The Third Circuit Court of Appeals in *Cohn v. G. D. Searle & Co., sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980) agreed with the Cohns and G. D. Searle & Co. petitioned for a writ of certiorari seeking a review by the United States Supreme Court. The

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1. All references hereinafter to *Searle* will be to the United States Supreme Court decision at 455 U.S. 404. Prior to and subsequent to the decision published in 455 U.S. 404, there were four other published decisions involving the same parties. For the sake of clarity, all cases other than *Searle* involving the same parties will be given an actual citation.

petition challenged the constitutionality of the New Jersey tolling statute, alleging said statute:

(a) violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(b) violated the Interstate Commerce Clause of the United States Constitution.

This Court held that the New Jersey tolling statute did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. However, the Court was unable to address the Commerce Clause challenge for reasons the Court did not anticipate when it granted the petition.

After consideration of briefs on the merits and oral argument, the Court determined that it could not address the Commerce Clause challenge because both the petitioner in its brief seeking certiorari and the respondents in their brief opposing certiorari failed to bring to the Court's attention procedural matters which required remand. *Searle*, 455 U.S. at 413.

Specifically, in response to the plenary briefs and oral hearing, this Court determined that the Third Circuit: (1) had not specifically addressed the Commerce Clause issue; and (2) had not determined whether the New Jersey tolling statute required a foreign corporation to register to do business in order to obtain benefits of the New Jersey statute of limitation. Because of this unanticipated lack of ripeness[2], the constitutional chal-

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2. Justice Powell, with Chief Justice Burger joining, in a separate opinion argued that the challenge of the New Jersey statute based upon the Interstate Commerce Clause was ripe for determination and opined that "With full knowledge that the Court of Appeals had ignored petitioner's Commerce Clause argument, we granted certiorari. Our grant did not limit the questions presented." *Searle*, 455 U.S. at 415.

lenge based on the Interstate Commerce Clause, although fully briefed and argued, was remanded.

Justice Blackmun, writing the majority opinion, stated the reason why the writ had been granted. With the concurrence of all nine justices[3], Justice Blackmun stated:

> **"Because of the novel and substantial character of the federal issue involved, we granted certiorari. . . ."** *Searle*, 455 U.S. at 408. (emphasis added)

The Copleys' jurisdictional appeal provides this Court with an opportunity to decide a question which the Court unanimously considered substantial and which two justices considered decisional.

II. Plenary consideration was given to Searle in response to a petition for certiorari. The Copleys' jurisdictional appeal on the identical issue should be briefed and orally argued.

In contrast to *Searle*, the Copleys' appeal is from the decision of a federal court declaring the Ohio Savings Statute unconstitutional.

Because the Third Circuit had ruled in favor of the Cohns, the New Jersey tolling statute had not been declared unconstitutional. G. D. Searle & Co.'s only recourse therefore was to petition the United States Supreme Court for a writ of certiorari. Granting the writ was purely discretionary. It was nonetheless granted because the question was patently substantial. Not only did the Court grant the writ, but it was accorded a

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3. Justice Powell and Justice Stevens wrote separate opinions. Both separate opinions expressed disagreement with the majority's decision to remand. However, both separate opinions agreed that the question was substantial.

plenary review with briefs on the merits and oral argument.

Here, the Sixth Circuit found the Ohio Savings Statute to be an unconstitutional infringement on the Interstate Commerce Clause. In doing so, the Court summarily dismissed the Copleys' otherwise timely commenced cause of action. Because the lower court's decision struck down a state statute, the Copleys are statutorily entitled to a review by the United States Supreme Court. *See* 28 U.S.C. Section 1254(2). *A fortiori,* the Copleys are entitled to the plenary review of their jurisdictional appeal which this Court, in its discretion, granted G. D. Searle & Co.

III. The substantial character of the question in Searle was analyzed by this Court.

As this Court opined in *Searle,* the question here involves balancing the sovereign right of a state to protect a citizen's right to recover for injury caused by an absent defendant versus the rights of manufacturers and vendors whose contacts with the subject state are purely interstate in character. Appellants argue that the reasoning of the Court in *Searle* in response to the issue of equal protection and due process should be adopted herein. The *Searle* decision held:

> "In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. (citation omitted) The New Jersey tolling provision need satisfy only this constitutional minimum. As the Court explained in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945):

> '[Statutes of limitation] represent public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.'" *Searle*, 455 U.S. at 408.

> "When the statute is examined under the Equal Protection Clause, it survives petitioner's constitutional challenge because rational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served." *Searle*, 455 U.S. at 410.

In contrast, Heil argues that the Ohio Savings Statute represents an unconstitutional interference with interstate commerce. Heil argues that the Ohio Savings Statute requires foreign corporations to either obtain licensure in Ohio or be denied the benefits of Ohio's statutes of limitation. Heil therefore argues that it is forced to potentially abandon jurisdictional defenses that might otherwise be available to it in actions commenced in Ohio. As such, Heil argues that the Ohio Savings Statute is an infringement on interstate commerce. As Justice Powell stated in his separate opinion in *Searle*:

> **"This squarely presents the serious question whether the consequences of registration in the State, solely to obtain the protection of the statute of limitations, unduly burden interstate commerce."** *Searle,* 455 U.S. at 419. (emphasis added)

Inasmuch as the *Searle* decision documents this Court's unanimous agreement that the question is substantial, the Copleys' jurisdictional appeal should be given plenary consideration.

IV. The judicial history of the Commerce Clause question following remand in Searle affirms the wisdom of this Court's decision finding the question to be substantial.

Immediately following the *Searle* remand on February 4, 1982, this Court issued two memorandum opinions remanding two other cases seeking writs on the identical issue.

1. On March 1, 1982, *Kelsey-Hayes, Inc. v. Roy Hopkins*, 455 U.S. 985 (1982), was, like *Searle*, remanded to the Third Circuit "for further consideration in light of [*Searle*]". *Id.* Said decision will hereinafter be referred to simply as "*Kelsey*".

2. On March 8, 1982, *Honda Motor Company Ltd. v. Walter P. Coons*, 455 U.S. 996 (1982), was remanded to the Supreme Court of New Jersey "for further consideration in light of [*Searle*]". *Id.* Said decision will hereinafter be referred to simply as "*Coons*".

The remand of *Searle* and *Kelsey* to the lower federal courts and the remand of *Coons* to the New Jersey state courts spawned 10 published decisions and at least one significant unpublished decision.

The rules requiring brevity in a jurisdictional statement permit only the most cursory summary of the judicial history after the aforesaid remands. In chronological order, that cursory history follows.

Case No. 1: *McKinley v. Combustion Engineering, Inc.*, 674 F.2d 812 (9th Cir. 1982)

Decided April 15, 1982.

The Ninth Circuit remanded to the Federal District Court the issue of whether Combustion Engineering, Inc., was barred from asserting the defense of statute of limitations. The Court held that Idaho tolling statutes are very similar to those that recently confronted the Supreme Court in *Searle*. *McKinley*, 674 F.2d at 816. The Ninth Circuit therefore remanded the issue to the Federal District Court for "threshold determination of these statutes' validity under the Commerce Clause." *Id.*

Case No. 2: *Walter P. Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) (hereinafter referred to simply as "*Coons I*"[4])

Decided August 3, 1983.

The New Jersey Supreme Court resolved the ambiguity (i.e. the ambiguity noted by this Court in *Searle*) with respect to the New Jersey tolling statute. Specifically, the New Jersey Supreme Court found the New

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4. Subsequent decisions by other courts have thumbnailed this initial New Jersey Supreme Court decision as *Coons I* to distinguish it from *Coons II*. *Coons II* is a subsequent decision by the New Jersey Supreme Court holding, on rehearing, that its decision in *Coons I* would operate prospectively. Inasmuch as all subsequent decisions refer to these two holdings as *Coons I* and *Coons II*, appellants will do likewise herein.

Jersey tolling statute requires licensure. Because of the licensure requirement, the Court held, in a 4 to 3 decision, that the New Jersey tolling statute violates the Commerce Clause.

Case No. 3: *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Id. 1983)

Decided November 15, 1983.

The Federal District Court declared the Idaho tolling statute an unconstitutional infringement of the Commerce Clause.

Case No. 4: *Walter P. Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 476 A.2d 763 (1984)

Decided June 13, 1984.

This decision is *Coons II*. *See* n. 4, *supra*. On rehearing of *Coons I*, the New Jersey Supreme Court modified its decision to give it prospective effect only.

Case No. 5: *McKinley v. Combustion Engineering, Inc.*, Case No. 84-3505 (9th Cir. Oct. 1, 1984)

Decided October 1, 1984.

In an unpublished decision, the Ninth Circuit reversed the holding of the Federal District Court. *See* Case No. 3, *supra*. The decision interpreted the Idaho tolling statute as requiring registration only for those foreign corporations having minimum contacts with Idaho and the statute therefore did not create an impermissible burden on interstate commerce.

Case No. 6: *Cohn v. G. D. Searle & Co.*, 598 F. Supp. 965 (D. N.J. 1984)

Decided December 7, 1984.

When *Searle* was remanded to the Third Circuit, the Third Circuit remanded to the Federal District Court. On remand, the Federal District Court adopted the holding in *Coons I* (holding New Jersey tolling statute unconstitutional under Commerce Clause), but rejected *Coons II* as controlling because the finding of prospectivity in *Coons II* was based on state law. Applying federal law as enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court held that *Coons I* would be retroactively applied by the federal courts. G. D. Searle & Co.'s motion to dismiss was granted. This decision was later reversed by the Third Circuit. *See* Case No. 9, *infra*.

Case No. 7: *Honda Motor Co. Ltd. v. Walter P. Coons*, and *Walter P. Coons v. Honda Motor Co. Ltd.*, 469 U.S. 1123 (1985)

Decided January 7, 1985.

The United States Supreme Court denied a writ of certiorari to petitioner, Honda Motor Co., Ltd., and also denied a writ to cross-petitioner, Coons. Justice Rehnquist, now Chief Justice, wrote a dissenting opinion urging the Court to grant the writ sought by the cross-petitioner. Justice Rehnquist urged granting of the writ for the following reasons:

1. The New Jersey Supreme Court resolved the ambiguity in the New Jersey tolling statute. 469 U.S. at 1124.

2. The New Jersey Supreme Court, in a 4 to 3 decision "has gone beyond any of our Commerce Clause decisions." *Id.*

3. The purpose of the New Jersey statute is "to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve." *Id.* at 1126.

4. "The statute does not place an insuperable burden on a foreign corporation because the foreign corporation may plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself." *Id.*

5. "The impact on interstate commerce . . . is fairly negligible." *Id.*

6. The New Jersey tolling statute "does not so scarcely benefit local interests and so clearly burden interstate commerce that we should decline the opportunity to review this *constitutional issue of first impression.* *Id.* at 1127. (emphasis added)

Case No. 8: *Love v. Johns-Manville Canada, Inc.*, 609 F. Supp. 1457 (D. N.J. 1985)

Decided May 29, 1985.

For reasons not articulated in its decision, the same Federal District Court that decided Case No. 6, *supra*, arrived six months later at a diametrically different conclusion. This decision applied federal law as enunciated by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), but applying the *Chevron* test held that *Coons I* should be applied prospectively.

Case No. 9: *Cohn v. G. D. Searle & Co.*, 784 F.2d 460 (3rd Cir. 1986)

Decided January 7, 1986.

The Third Circuit reversed the Federal District Court's decision in Case No. 6, *supra*. Applying the *Chevron* test, the Third Circuit adopted the reasoning enunciated in *Coons II*. Prospective application only was given to *Coons I*. Cohns' cause of action was preserved. The Court noted:

> "Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive." *Id.* at 465.

Case No. 10: *G. D. Searle & Co. v. Susan Cohn*, 55 U.S.L.W. 3257 (1986)

Decided October 14, 1986.

A writ of certiorari was sought by G. D. Searle & Co. seeking review of the Third Circuit decision giving prospective application only to the finding that New Jersey's tolling statute unconstitutionally infringed on interstate commerce. The petition was denied.

Case No. 11: *Copley, et al. v. Heil-Quaker, Corp., et al.*, No. 86-3360 (6th Cir. May 20, 1987)

Decided May 20, 1987.

The Sixth Circuit Court of Appeals struck down the Ohio Savings Statute as an unconstitutional infringement on interstate commerce. The decision was applied retroactively and the Copleys' cause of action was summarily dismissed.

Case No. 12: *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (6th Cir. 1987)

Decided June 3, 1987.

The Sixth Circuit consolidated this appeal with the Copleys' appeal because the identical Commerce Clause question was presented. Bendix's claim was also summarily dismissed. In summarily dismissing the Bendix cause of action, the Court stated: "We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand." *Id.* at 188. The reference to *Coons* is to Case No. 2, *supra*, and the reference to *McKinley* is to Case No. 3, *supra*. Therefore, the Sixth Circuit adopted the reasoning of two cases, both of which were later reversed. See Case Nos. 4 and 5, *supra*.

CONCLUSION

There are compelling reasons for giving plenary review to the Copleys. The reasons are summarized herein.

1. The granting of petitions for writs of certiorari is discretionary. Exercising that discretion, writs issued in *Searle, Kelsey* and *Coons* on the identical question herein. No lesser consideration should be given to a jurisdictional appeal.

2. This Court in *Searle* unanimously opined that the question is substantial. The Court could not address the admittedly substantial question because of lack of ripeness. No such problem exists here.

3. The holding by the Sixth Circuit deprived the Copleys of any remedy whatsoever. In the entire judicial history of the question herein, the Copleys are unique in that regard. By way of example, the writ granted G. D. Searle & Co. involved a finding which impacted on only one of many potential defenses available to G. D. Searle & Co. Notwithstanding the *Searle* decision, G. D. Searle & Co. received a day in court. The Copleys have not.

4. The Copleys' appeal not only presents an opportunity to review the threshold issue of whether tolling statutes violate the Commerce Clause but provides the further opportunity to review an inevitable correlated issue, i.e. if tolling statutes are violative of the Commerce Clause, should such holdings operate prospectively or retroactively.

5. With respect to the retroactivity issue, there is now a conflict between two federal courts of appeal (i.e. the Third Circuit and the Sixth Circuit), as well as a conflict between a federal court of appeals (i.e. the Sixth

Circuit) and a state court of last resort (i.e. the New Jersey Supreme Court). Either of these conflicts in and of itself is grounds suggesting a plenary review. *Rules of the Supreme Court of the United States,* Rule 17(A) and 17(B).

6. The two cases upon which the Federal District Court relied to summarily dismiss the Copleys' cause of action were both reversed. The Federal District Court cited *Coons I* and *McKinley v. Combustion Engineering, Inc.,* 575 F. Supp. 1942 (1983) in reaching the decision to summarily dismiss the Copleys' cause of action. Both of said cases were reversed. *See* Case No. 4 and Case No. 5, *supra.* Nonetheless, the Sixth Circuit affirmed the District Court.

Respectfully submitted,

JAMES T. MURRAY, *Counsel of Record*
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorney for Appellants

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 20, 1987)

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,
Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN, JONES, and MILBURN, *Circuit Judges.*

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action against Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due dilligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest, on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May ...., 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 8, 1984)

Case No. C 82-512

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM COPLEY, *et al.*,
Plaintiffs,

vs.

HEIL-QUAKER CORP., *et al.*,
Defendants.

MEMORANDUM AND ORDER

POTTER, *J.*:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix, *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., No. C 83-682. This case was transferred to this Court from the District of Minnesota, Fourth Division, pursuant to the provisions

of 28 U.S.C. §1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues herein were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that on December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are con-

ducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio. Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the consortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. §2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims

against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. §2305.16 provides that, as to him, the two-year period of limitations would commence to run when his minority terminated. Thus his time to assert his claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. §3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. §2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed . . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long-arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that §2305.15. as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process

Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that §2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to do business pursuant to O.R.C. §1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contract required for suit in Ohio. Under the Due Process Clause and the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310, (1945), Heil-Quaker further argues that §2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically §1703.02 and §2305.15, constitute a trap for unwary sellers.

Heil-Quaker also asserts that §2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their businesses. Finally, Heil-Quaker argues that §2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court

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1. The argument that the provisions of O.R.C. §2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice* [sic] *Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice* [sic] *Church, Inc., supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice* [sic] *Church, Inc., supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. §2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. §2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court

for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra*, remanded the case to the district court for a

decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate com-

merce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley,* the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley,* this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. §2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that

the provisions of O.R.C. §2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's. Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. §111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.*

14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant part as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons, supra,* at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. §111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mill, Corporations Counsel for the Secretary of State, dated December 22, 1983. to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation

might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricial Mill [sic], dated September 14, 1983, in which Ms. Mill [sic] indicated as follows:

> Pursuant to Sction [sic] 1703.041 O.RC., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. §2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. §2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in

Minnesota. That court dismissed plaintiff's claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. §2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. §2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. §2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. §2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St. 3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plain-

tiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. §2072. Plaintiffs, in the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dismiss and ordered

the case transferred to this Court pursuant to the provisions of 28 U.S.C. §1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. §2305.10 and that any tolling provisions set forth in O.R.C. §2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ JOHN W. POTTER
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Received by the Court of Appeals for the Sixth Circuit June 4, 1987)

Case No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY, *et al.*,
Plaintiffs-Appellants,

vs.

HEIL-QUAKER CORP., *et al.*,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Copley, Patsy Copley and Dale Copley, plaintiffs-appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit, dismissing the complaint entered in this action on May 20, 1987. Specifically, the appeal is taken from the final judgment of the United States Court of Appeals for the Sixth Circuit declaring the Ohio Savings Clause, Ohio Revised Code Section 2305.15, to be in violation of the Commerce Clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

JAMES T. MURRAY
MURRAY & MURRAY Co., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
PH: (419) 627-9700
Attorneys for Plaintiffs-Appellants

OHIO REVISED CODE

§ 2305.15 Saving clause.

(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

(B) When a person is imprisoned for the commission of any offense, the time of his imprisonment shall not be computed as any part of any period of limitation, as provided in section 2305.09, 2305.10, 2305.11, or 2305.14 of the Revised Code, within which any person must bring any action against the imprisoned person.

*HISTORY: 141 v S 151. Eff 7-9-86.

CONSTITUTION OF THE UNITED STATES

Art. I, § 8

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * *

STATUTES INVOLVED

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

* * * * *

28 U.S.C. § 2103

§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

(June 25, 1948, c. 646, 62 Stat. 962; Sept. 19, 1962, Pub.L. 87-669, § 1, 76 Stat. 556.)

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-170

In The
Supreme Court of the United States
October Term, 1987

—o—

WILLIAM COPLEY, *et al.*,
Appellants,
v.
HEIL-QUAKER CORP., *et al.*,
Appellees.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

STANLEY M. LIPNICK
Counsel of Record
ARNSTEIN, GLUCK,
LEHR & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, by withholding the benefit of the statute of limitations from corporations which are not licensed to do business in Ohio, the Ohio "Saving clause," § 2305.15, Ohio Revised Code, violates the Commerce Clause as applied to Heil-Quaker Corporation, which has no intrastate contacts with Ohio and which manufactured in Tennessee and shipped in interstate commerce a product which allegedly caused an injury in Ohio.

2. Whether the Court of Appeals abused its discretion by refusing to entertain the argument, which was first raised before it in a reply brief and which had not been raised before the District Court at all, that the declaration of unconstitutionality of § 2305.15 as applied should have been made operative only prospectively; and, even if it did, whether the lower courts had any choice but to decide this case by applying the constitutional holding which the District Court rendered in this case and which the Court of Appeals affirmed.

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No. 87-170

—o—

In The
Supreme Court of the United States
October Term, 1987

—o—

WILLIAM COPLEY, *et al.*,

Appellants,

v.

HEIL-QUAKER CORP., *et al.*,

Appellees.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

Appellee Heil-Quaker Corporation[1] ("Heil-Quaker") moves to affirm the judgment dismissing appellants' claim

1. Heil-Quaker Corporation is a wholly owned subsidiary of Inter-City Gas Corp.

against it on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals in this case was not bound with the Jurisdictional Statement served on Heil-Quaker and is therefore reproduced in full commencing at page SA 1 of the Supplemental Appendix bound with this motion. It does not, however, contain the Court's reasoning on the questions raised by this appeal but simply refers to the court's decision in *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, No. 85-3784, now reported at 820 F.2d 186 (6th Cir. 1987), with which this case had been consolidated for argument and which was decided by the same panel of the Court of Appeals.

JURISDICTION

Appellants are natural persons, citizens of Ohio, and were plaintiffs in the District Court. They sued for injuries allegedly sustained as a result of a furnace explosion in their home. The defendants in the District Court were Heil-Quaker, a Delaware corporation headquartered in Tennessee, Sears, Roebuck and Co., a New York corporation headquartered in Illinois, and Honeywell, Inc., a Delaware corporation headquartered in Minnesota. The Dis-

trict Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332.

On March 8, 1984, the District Court granted motions for summary judgment of Heil-Quaker and Sears, but did not then dispose of appellants' claim against the third defendant, Honeywell, and did not certify its decision in favor of Heil-Quaker as final pursuant to Rule 54(b), Fed. R. Civ. P. On March 25, 1986, the District Court entered summary judgment dismissing appellants' claim against the remaining defendant, Honeywell, and dismissed as moot Honeywell's third party complaints against Sears, Frey & Sons and Phillips Bottled Gas Company, thus disposing of all pending claims. Appellants appealed from the dismissal of their claims against Heil-Quaker and Honeywell.

The Court of Appeals affirmed the District Court's judgment dismissing appellants' claim against Heil-Quaker on the ground that it is barred by limitations, sustaining the District Court's holding that the Ohio tolling statute on which appellants sought to rely violates the Commerce Clause of the Constitution of the United States as applied to Heil-Quaker. The Court of Appeals' decision was rendered on May 20, 1987, and appellants' notice of appeal to this Court was filed on June 4, 1987. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1254(2).

———o———

COUNTERSTATEMENT OF THE CASE

Appellants filed their action against Heil-Quaker on August 24, 1982 in the United States District Court for

the Northern District of Ohio. They sought recovery for personal injuries allegedly inflicted on December 12, 1975, over six years before the complaint was filed, by an explosion of a furnace made by Heil-Quaker, allegedly caused by a malfunctioning valve which had been manufactured by defendant Honeywell. They alleged that they had purchased the furnace from Sears, the third defendant, and installed it in their home fifteen years in the past.

Heil-Quaker moved to dismiss on the ground that the claim against it is barred by Ohio's two year statute of limitations for actions for bodily injury, § 2305.10, Ohio Revised Code. Appellants did not dispute the applicability of the two year statute of limitations to their claim against Heil-Quaker, nor did they contend that their action had been brought within that time. However, since Heil-Quaker is not amenable to personal service *within* Ohio, appellants argued that their claim against it is preserved by Ohio's "Saving clause," § 2305.15, Ohio Revised Code:

> When a cause of action accrues against a person, if he is out of state . . . the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, of the Revised Code, does not begin to run until he comes into the state . . . .

This statute has been construed to toll the running of limitations so long as personal service upon the defendant cannot be made physically within the state, even when "long-arm" service is readily available as it was in this case.[2] *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971).

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2. Appellants directed their complaint against Heil-Quaker to its registered agent in Delaware, the state in which it is incorporated.

Heil-Quaker established by an uncontroverted affidavit that it has no intrastate contacts with Ohio, and appellants concede at page 3 of their Jurisdictional Statement that Heil-Quaker's commercial activities in Ohio are purely interstate in character. The trial court found that obtaining a license to do business in Ohio is the only procedure by which an out of state corporation in Heil-Quaker's position can appoint an agent for service of process *within* Ohio and thereby satisfy the "Saving clause" as construed by the state's Supreme Court.

The trial court analyzed the "Saving clause" using both a *per se* approach and a balancing test and, under both standards, held it violative of the Commerce Clause as applied to Heil-Quaker. He therefore granted Heil-Quaker's motion to dismiss the complaint against it as barred by Ohio's two year personal injury statute of limitations, without reaching Heil-Quaker's additional contention that the Ohio statutory scheme violates the Due Process Clause. Appellants' contention that the constitutional decision should be applied prospectively only and not in this case, was neither raised in the District Court nor considered by it. The District Court also dismissed on limitations grounds appellants' claims against the other defendants, Sears and Honeywell, and appellants appealed from the dismissal of their claims against Heil-Quaker and Honeywell.

The Court of Appeals set the appeal in this case for argument at the same time and before the same panel as the appeal in its Case No. 85-3784, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, in which the same Commerce Clause question was presented. In fact, the *Bendix* case

had been filed in the same District Court as this case, and was pending at the same time and before the same judge. He permitted the parties in the *Bendix* case to participate in oral argument on Heil-Quaker's motion to dismiss, and released his decision on Heil-Quaker's motion to dismiss simultaneously with his decision on the *Bendix* defendant's motion to dismiss.

The Court of Appeals affirmed the District Court's judgment dismissing appellants' complaint against Heil-Quaker and, for its reasoning on the Commerce Clause issue, simply referred to its decision in the *Bendix* case, now reported at 820 F.2d 186. In *Bendix* the Sixth Circuit agreed with the District Court in all respects—that an out of state corporation having no intrastate contacts with Ohio can satisfy the state's "Saving clause" only by obtaining a license to do business in Ohio, a process which includes appointment of an agent for service, and that the Ohio tolling provision violates the Commerce Clause as applied to corporations in the position of the *Bendix* defendant and Heil-Quaker both under a *per se* approach and using a balancing test in which the burden on commerce is weighed against possible benefits to local interests. The Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the Commerce Clause ruling should be given prospective effect only. 820 F.2d at 189. The appellants in this case did not themselves brief or argue any of the Commerce Clause issues before the Court of Appeals but simply adopted the briefs and argument of Bendix on that question.

ARGUMENT

1. The Sixth Circuit's Commerce Clause Holding Is Correct

G.D. Searle & Company v. Cohn, 455 U.S. 404 (1982), involved a New Jersey tolling statute which, like the Ohio statute in this case, had been construed by the state's highest court to toll limitations whenever the defendant was not amenable to personal service *within* the state, regardless of the availability of "long arm" service.[3] This Court sustained the New Jersey statute under the Equal Protection Clause but withheld adjudication of its validity under the Commerce Clause pending a determination on remand whether, as a matter of state law, a foreign corporation could avoid tolling by any means short of becoming licensed to do business in New Jersey. The *Searle* remand indicated at least a serious question under the Commerce Clause if an out of state corporation could avoid the tolling effect of the New Jersey statute only by becoming licensed to do business there.

On remand *Searle* was stayed by the lower federal courts pending adjudication of the same issue in a case then pending before the courts of New Jersey. In a decision to which appellants refer as "*Coons I*," the Supreme Court of New Jersey held, as a matter of state law, that an out of state corporation could indeed avoid the tolling effect of the New Jersey statute only by becoming licensed to do business within the state; and further held that the

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3. *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated*, 455 U.S. 985 (1982); compare, *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971).

state's tolling statute amounted to a forced licensing provision, *per se* violative of the Commerce Clause. *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) (*"Coons I"*), *rehearing granted*, 95 N.J. 234, 470 A.2d 446 (1984), *mod. clarified*, 96 N.J. 419, 476 A.2d 763 (1984) (*"Coons II"*), *cert. denied*, 469 U.S. 1123 (1985).

Coons I relied upon a settled line of this Court's decisions, citing *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), which hold that no state may require licensure of persons doing business in other states as a condition of access to the state courts in connection with their interstate businesses. The New Jersey Court in *Coons I* explained (463 A.2d at 927) that a state legislature:

> "cannot accomplish indirectly that which it could not do directly; it cannot in effect force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional."

This straightforward application of settled law was approved and followed by the Sixth Circuit in its own constitutional decision in *Bendix*, 820 F.2d at 188, its vehicle for explaining the decision in this case. It is clearly correct and does not require further consideration.

The Sixth Circuit also approved and adopted the balancing approach under which the trial court had also in-

validated the Ohio "Saving clause" as applied to Heil-Quaker, focusing upon the dilemma faced by the out of state corporation forced to choose between exposing itself to personal jurisdiction in the state courts or remaining liable in perpetuity for all lawsuits containing state causes of action where "long-arm" jurisdiction might successfully be asserted. The courts of Ohio exercise jurisdiction over *all* causes of action asserted against a defendant who is personally served within the state, even when no party is an Ohio resident and Ohio has no connection with the cause asserted. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931); *The Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 Ohio App. 116, 197 N.E.2d 379 (1963). Thus, in order to obtain the benefit of the limitations defense in cases in which Ohio may have a sufficient interest to assert "long-arm" jurisdiction, the scheme of Ohio law requires an out of state corporation like Heil-Quaker to take action which would subject it to the jurisdiction of Ohio's courts in *other* cases, in which Ohio has no interest, and which Due Process Clause would otherwise prohibit Ohio from asserting.

The lower courts in this case had adopted the balancing analysis found in the District Court opinion in *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D. Ida. 1983), *affirmed in part, reversed in part*, 746 F.2d 1486 (mem. unpub.) (9th Cir. 1984). Appellants' discussion of *McKinley* searches wishfully for conflict which does not exist. In *McKinley* the Ninth Circuit *affirmed* the District Court's judgment dismissing the complaint on limitations grounds, rendering its decision by unpublished mem-

orandum,[4] reprinted commencing at page SA 6 of the Supplemental Appendix bound with this motion. It held that the Idaho statute withholding the limitations defense from unlicensed corporations simply does not apply to corporations which lack minimum intrastate contacts with Idaho and therefore posed no impediment to the limitations defense which had been asserted and which was upheld in that case. There is no inconsistency between that decision and the decisions of the lower courts here holding the Ohio statute invalid as applied precisely because it does what the Idaho statute does not—withholds the limitations defense from unlicensed corporations which *do* lack minimum intrastate contacts with the State.

Thus, the Sixth Circuit's balancing approach, like its *per se* analysis, merely constitutes an unremarkable application of well established principles. Plenary review by this Court is unwarranted.

2. The Lower Courts Properly Applied Their Constitutional Holding In This Case

At the outset, the Sixth Circuit refused to entertain the argument for nonretroactive application of the constitutional decision specifically because it was raised for the first time in a reply brief. *Bendix,* 820 F.2d at 189. The Court merely applied a generally established principle of appellate procedure,[5] and plenary review by this Court is unwarranted.

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4. Ninth Circuit Rule 21(c) prohibits citation of such a decision as precedent within that Circuit.

5. *E.g., Beerly v. Department of Treasury,* 768 F.2d 942, 949 (7th Cir. 1985), *cert. denied,* — U.S. —, 89 L.Ed.2d 301 (Feb. 4, 1986); *Knighten v. C.I.R.,* 702 F.2d 59, 60 n.1., *rehearing denied,* 705 F.2d 777 (5th Cir.), *cert. denied,* 464 U.S. 897 (1983); *Thompson v. C.I.R.,* 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

Moreover, even if the Sixth Circuit had considered the nonretroactivity argument, it was reviewing a judgment of the District Court before which that argument had not been raised at any time. The District Court hardly abused its discretion by applying in deciding this case the holding which it rendered in this case when it had not been asked by either the plaintiffs in this case (appellants here) or Bendix, the plaintiff in the related case, to do anything else.

Furthermore, even if the request for nonretroactive application had been presented properly to the lower courts, still the judgment dismissing the complaint against Heil-Quaker should be affirmed. The constitutional decision invalidating Ohio's "Saving clause" was rendered by the District Court *in this very case.*[6] The Constitutional "case or controversy" limitation upon the very jurisdiction of the federal courts *required* that the District Court apply in this case the constitutional holding which it rendered in this case, for its decision would otherwise have been a mere advisory opinion. *Stovall v. Denno,* 388 U.S. 293, 301 (1967).[7]

Moreover, earlier this year, this Court reconsidered the doctrine which had permitted new constitutional holdings to be applied prospectively only and not to cases still pending at the time a new holding was announced. In *Griffith v. Kentucky,* 479 U.S. —, 93 L.Ed. 2d 649 (January 13, 1987), the Court held that a new constitutional rule

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6. The District Court's decision was announced in simultaneously released memorandum opinions entered in this case and in the related *Bendix* case.

7. While *Stovall v. Denno* was a criminal case, the principle for which it is cited is equally applicable to civil cases.

for the conduct of a criminal prosecution is to be applied *without* exception to *all* cases not yet final, for several reasons, including the necessity to preserve the integrity of judicial review by resolving pending cases in light of the courts' best understanding of governing constitutional principles. 93 L. Ed. 2d at 658-661. This principle of *Griffith v. Kentucky* is equally applicable to civil cases and requires that this case too be decided in accordance with the courts' best understanding of the governing constitutional principle.

Appellants observe, correctly, that in *Coons II* the Supreme Court of New Jersey directed, as a matter of *state* law, that its *Coons I* decision be applied prospectively only and not even in the case pending before it. Thereafter, the decision of unconstitutionality of the New Jersey statute was applied prospectively only as a matter of *federal* law in *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir.), *cert. denied*, — U.S. —, 93 L.Ed. 2d 248 (Oct. 14, 1986) on remand of the very case in which the Commerce Clause issue had been raised in this Court. The fact that the Third Circuit, acting without the benefit of this Court's decision in *Griffith v. Kentucky*, reached a decision at variance with the principles of that decision, does not require plenary review by this Court of the Sixth Circuit's decision in this case, a decision which is required by the principles of both *Griffith v. Kentucky* and *Stovall v. Denno*, and where the claim for nonretroactivity was not properly raised in either of the lower courts in the first place.

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CONCLUSION

In this case the lower courts applied settled legal principles in an unexceptional manner. The dismissal of the complaint against Heil-Quaker on the ground that it is barred by the two year statute of limitations is clearly correct, poses no question which requires further briefing or argument before this Court, and should now be affirmed.

Respectfully submitted,

STANLEY M. LIPNICK
Counsel of Record
ARNSTEIN, GLUCK,
LEHR & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100

SUPPLEMENTAL APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,

Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

/

Before: MARTIN, JONES, and MILBURN, Circuit Judges.

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due diligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more

> than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the

commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May —, 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DEAN MCKINLEY; ANN MARIE ROWELL; JOHN MICHAEL MCKINLEY; and CAROLYN IRENE HEISE,

Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., and UNIVERSITY OF CHICAGO,

Defendants-Appellees.

No. 84-3505
D.C. No. CIV 80-4045
MEMORANDUM*

Argued and Submitted—September 5, 1984

Decided—October 1, 1984

Appeal from the United States District Court
District of Idaho

Hon. Marion J. Callister, Chief Judge, Presiding

Before: WRIGHT, Senior Circuit Judge, and PREGERSON and CANBY, Circuit Judges.

I. *Background*

This diversity wrongful death action was brought by the heirs of Richard D. McKinley, who was killed in an

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing [*sic*] publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

accident at an experimental nuclear reactor in Idaho Falls in 1961. Eighteen years after the accident, his heirs brought suit against the builder and operator of the experimental reactor, Combustion Engineering. The heirs argue that former Idaho Code § 30-509,[1] (repealed 1979), prevents Combustion Engineering from asserting a statute of limitation defense based on Idaho Code § 5-219 (1979), a two-year statute that governed wrongful death actions.

The district court initially held that § 30-509 did not apply where the defendant foreign corporation could have been served pursuant to Idaho's long-arm statute, Idaho Code § 5-514 (1979). Because § 30-509 did not apply, the district court found that Combustion Engineering was not precluded from asserting a statute of limitations defense. *See* Order Memorandum Decision, *Brackney v. Combustion Engineering, Inc.*, Civ. No. 79-4017 (D. Idaho 1980).[2]

On appeal, another panel of this court declined to decide whether the district court's conclusion regarding

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[1]Former Idaho Code § 30-509 (1967) provides:

> 30-509. *Statute of Limitations.* Every such corporation which fails to comply with the provisions of this chapter [requiring, e.g., filing articles of incorporation with the Secretary of State, designating an agent for service of process] shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

[2]The Brackneys were the heirs of Richard C. Legg, who was killed in the same explosion as McKinley. The district court held that its decision in the *Brackney* case controlled in the *McKinley* action. The Brackneys later voluntarily dismissed their action.

the interaction of § 30-509 with Idaho's long-arm statute was correct. *Brackney v. Combustion Engineering, Inc.*, 674 F.2d 812, 816 (9th Cir. 1982). We did not indicate any disagreement with district court's construction of Idaho law. Rather, we vacated the portion of the district court's opinion dealing with § 30-509 and remanded for consideration of a threshold issue—whether § 30-509 violated the Commerce Clause. On remand, the district court concluded that § 30-509 imposed an impermissible burden on interstate commerce. *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983).

On this appeal, with apologies to all, we must reverse the district court's holding that former Idaho Code § 30-509 violates the Commerce Clause and reach the issue of Idaho law that was reserved in the original appeal. We agree with the district court's interpretation of Idaho law, and find that § 30-509 does not apply where a defendant foreign corporation could have been served with process under Idaho's long-arm statute.[3]

II. *Standard of Review*

The heirs appeal the district court's decision to dismiss their action under Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) necessarily involves only questions of law and is reviewable *de novo*. *Guillory v.*

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[3]In its Order and Memorandum Decision in *Brackney v. Combustion Engineering, Inc.*, Civ. No. 79-4017 (D. Idaho 1980), the district court gave the McKinley heirs thirty days to file proof that they could not have served Combustion Engineering pursuant to Idaho's long-arm statute. When the heirs failed to make such a showing, the district court found that Combustion Engineering could assert the statute of limitations defense, and dismissed the McKinleys' action as time-barred.

County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *North Star Int'l. v. Arizona, Corp. Comm'n.,* 720 F.2d 578, 580 (9th Cir. 1983). We also review the district court's fidings of state law *de novo. Churchill v. F/V Fjord (In re McLinn),* No. 82-3644 (9th Cir. Aug. 7, 1984) (en banc).

III. *Section 30-509 Does Not Impermissibly Burden Interstate Commerce*

The McKinley heirs argue that by not raising the Commerce Clause issue in the district court in the first instance, Combustion Engineering waived its rights to make the constitutional challenge. The general rule regarding waiver of issues not presented to the district court is flexible enough to allow constitutional issues to be raised initially on appeal. *Krause v. Sacramento Inn,* 479 F.2d 988, 989 (9th Cir. 1973) (general rule that court will not consider constitutional issues raised for first time on appeal is not a jurisdictional limitation but merely a rule of practice). It must be assumed that the previous panel found exceptional circumstances justifying the raising of a constitutional issue *sua sponte* on appeal. Given that the court itself raised the issue, we may not now dispose of the issue by finding that Combustion Engineering waived its constitutional challenge.

Combustion Engineering argues that any state statutes affecting its operations were preempted when Congress enacted the Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1976 & Supp. V 1981). The Supreme Court has recently held, however, that Congress has not preempted

state law remedies available to those injured in nuclear accidents. *See Silkwood v. Kerr-McGee Corp.*, — U.S. —, 104 S.Ct. 615, 625 (1984). Statutes of limitations are very remote from Congressional regulation concerning the safety of nuclear power plants.

We reverse the district court's conclusion that § 30-509 violates the Commerce Clause for two reasons. First, we find that the burden on interstate commerce is insignificant. Second, we find that the district court was wrong in relying on cases construing a similar New Jersey statute is distinguishable from § 30-509 because it imposed a much greater burden on interstate commerce. We discuss these points in order.

First, we find that as interpreted by Idaho courts, § 30-509 does not significantly burden interstate commerce. The only burden that Combustion Engineering singles out is that § 30-509 requires that foreign corporations waive personal jurisdiction by appointing an agent in order to benefit from Idaho's statute of limitations. This argument fails because Combustion Engineering in particular, and most foreign corporations in general, are not forced to choose between personal jurisdiction and a statute of limitations defense. Idaho state court interpretations of Idaho's statutes dealing with foreign corporations insure that a corporation doing enough business in Idaho to require it to register and appoint an agent will be doing enough business to subject it to personal jurisdiction in Idaho. In order to be subject to the registration requirements, a foreign corporation must be doing a substantial amount of business—more business than it takes to subject the corporation to Idaho's long-arm jurisdiction. *See B.B.P. Assoc., Inc. v. Cessna Air-*

craft Co., 91 Idaho 259, 420 P.2d 134 (1966) (a corporation not doing sufficient local business to subject it to registration requirements could be dong enough business to subject it to long-arm statute personal jurisdiction).

In the instant case, Combustion Engineering was never faced with the choice of waiving personal jurisdiction or giving up its statute of limitations defense. Combustion Engineering had "substantial or continuous and systematic" activities in Idaho. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). Even if its activities were not classified as continuous and systematic, Combustion Engineering (1) purposely availed itself of the privilege of conducting activities in the forum; (2) the claim arose from forum-related activities; and (3) exercise of jurisdiction seems reasonable. *Data Disc*, 557 F.2d at 1287. Thus, Combustion Engineering was not forced to give up a valid personal jurisdiction defense in order to protect its right to use Idaho's statute of limitations.

In short, we find that § 30-509 imposes no significant burden on interstate commerce.

Second, we conclude that the district court relied too heavily on cases construing a similar New Jersey statute. In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Supreme Court considered an equal protection challenge to a New Jersey statute similar to § 30-509 because the New Jersey statute also required foreign corporations to register or lose their statute of limitations defenses. The Supreme Court did not decide the Commerce Clause issue because it had not been passed on by the District and Circuit Courts, but Justice Powell and Chief Justice Burger,

in a concurrence, characterized the Commerce Clause challenge as having "considerable force." *Id.* at 420 (Burger, C.J., and Powell, J., concurring in part and dissenting in part). After the Supreme Court's decision, the New Jersey Supreme Court found in *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) that the New Jersey statute violated the Commerce Clause. The New Jersey Supreme Court's finding of unconstitutionality was based on the fact that the New Jersey statute sought to impose licensing on foreign corporations dealing *exclusively* in interstate commerce, a practice long held invalid. *See, e.g., Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974); *International Text-Book Co. v. Pigg*, 217 U.S. 91 (1910). The Idaho statute, by contrast, was construed long ago by the Idaho Supreme Court to apply only to corporations doing significant intrastate business. *See Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 P. 58 (1905).

Furthermore, because the New Jersey statute applied to corporations engaged solely in interstate commerce, it forced foreign corporations without minimum contacts in New Jersey to choose between appointing an agent for service or losing a statute of limitations defense. As we noted above, this is not true of the Idaho statute; when a corporation does enough intrastate business to require it to register, it will *a fortiori* have enough minimum contacts to be subjected to personal jurisdiction.

In short, we believe the New Jersey statute is distinguishable, and the district court erred in concluding that § 30-509 imposed an impermissible burden on interstate commerce.

IV. *Section 30-509 Does Not Apply*

Having resolved the "threshold issue" by finding § 30-509 constitutional, we now review the district court's original finding that § 30-509 does not apply to the facts of this case. We affirm the district court. The district court found that the purpose of § 30-509 was to protect Idaho plaintiffs who could not easily serve in Idaho foreign corporations that had not registered or designated an agent for service in Idaho. The statute, in essence, tolls the statute of limitations during the period when service is difficult or impossible to effectuate, and allows the statute to run when service is possible due to the presence of an agent in Idaho. With the advent of Idaho's long-arm statute, Idaho Code § 5-514, which makes foreign corporations amenable to service whether they have an agent for service in the state or not, § 30-509's scope was considerably narrowed. After the enactment of § 5-514, § 30-509 applied only where plaintiffs could show that it was impossible to serve the foreign corporation via the long-arm statute.

The district court's construction is supported by an Idaho Supreme Court decision construing an analogous tolling provision in light of Idaho's long-arm statute. In *Lipe v. Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975), the Idaho Supreme Court interpreted Idaho Code § 5-229 (1979), which tolls the statute of limitations while a defendant is absent from the state. *Lipe* also involved a foreign corporation that had not qualified to do business in Idaho, but the plaintiffs in that case apparently relied on § 5-229, and overlooked § 30-509. The court held that the statute of limitations was not tolled even though Javelin Tire was arguably absent from the state, because

Javelin Tire could have been served under the long-arm statute. The court said

> We believe the purpose of I.C. § 5-229 was to prevent the running of the statute of limitations during the time that a defendant was unavailable for service of process because he was absent from the state, and we construe it with that purpose in mind. We now adopt what we believe the more reasonable interpretation of these statutes. Excepting circumstances where the foreign corporation cannot be located for service of process with reasonably diligent efforts, the statute of limitations has not tolled against a foreign corporation which has not qualified to do business within the state during any period of time in which the corporation is subject to the jurisdiction of the courts of this state and may be personally served without the boundaries of this state under the long arm statute.

536 P. 2d at 294. We believe the district court's reasoning and its application of the *Lipe* decision are correct. Thus, § 30-509 is inapplicable to this case, and Combustion Engineering is free to assert the statute of limitations defense.

V. *Conclusion*

The district court originally concluded that the McKinley heirs' claims were barred by the applicable statute of limitations unless Combustion Engineering was precluded from raising the statute of limitations defense by § 30-509. Because § 30-509 is inapplicable, the heirs' claims are barred.

REVERSED IN PART. AFFIRMED IN PART. EACH PARTY TO BEAR ITS OWN COSTS.

No. 87-170
and
No. 87-171

SEP 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM COPLEY, et al., Appellants,

vs.

HEIL-QUAKER CORP, et al., Respondents.

No. 87-170

WILLIAM COPLEY, et al., Petitioners,

vs.

HEIL-QUAKER CORP., et al., Respondents.

No. 87-171

APPELLANTS' REPLY BRIEF

AND

PETITIONERS' REPLY BRIEF

James T. Murray, Counsel of Record
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700

Attorney for Appellants and Petitioner

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I. APPELLANTS' REPLY BRIEF

The Sixth Circuit's decision in Copley, et al. vs. Heil-Quaker Corp., et al., No. 86-3360 (6th Cir. May 20, 1987) will hereinafter be referred to simply as "the Copley decision."

A. "The Copley decision" restricts the authority of the states in a manner that goes significantly beyond any other Commerce Clause decisions of the Supreme Court of the United States.

Appellee admits that the issue raised is a "serious question." Motion to Affirm p. 7. Appellee argues, however, that "the Copley decision" is "an unremarkable application of well-established principles." Motion to Affirm, p. 10. This assertion is ill founded. Affirmance would represent a quantum leap in the restrictions on state authority circumscribed

by the Commerce Clause. Chief Justice Rehnquist has so stated.

> [I]n striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. Honda Motor Co. Ltd. v. Coons, 469 U.S. 1123, 1124 (1985).
>
> Although both Allenberg Cotton and Sioux Remedy involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State. Id. at 1125.
>
> I am not so sure that Allenberg Cotton and Sioux Remedy can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Id.

B. The nondiscriminatory nature of the Ohio Savings Statute renders affirmance particularly inappropriate.

The Ohio Savings Statute is totally nondiscriminatory. In fact, it does not even

mention foreign corporations. Ohio courts have consistently applied the statute against Ohio residents who, after injuring another person in the State of Ohio, were not present in the state and therefore not amenable to service of process. See: Wetzel v. Weyant, 41 Ohio St. 2d 135, 323 N.E. 2d 711 (1975), Burman v. Lach, 2 Ohio App. 3d 317, 441 N.E. 2d 1150 (1982) and Fisher v. Austriaco, 2 Ohio App. 3d 133, 440 N.E. 2d 1241 (1981).

The importance of nondiscrimination in upholding a state statute against a constitutional challenge based on the Commerce Clause was recently addressed by the Supreme Court of the United States in CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987). The court stated:

> The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. Id. at 4483 (emphasis added)

An affirmance by the Supreme Court of the United States would represent a profound change in the right of individual states to protect its citizens' rights to assert claims against any one (not just foreign corporations) not amenable to service within the state.

To effect such a profound change without any deliberation would be inappropriate.

C. The prospectivity issue was timely raised by appellants. There was no authority for challenging the retroactive application of the Federal District Court's decision when it was rendered on March 3, 1984.

1. Appellee inexplicably suggests that because Bendix Autolite Corporation (an appellant in a

wholly different and distinct case) first raised the prospectivity issue in their reply brief, the Copleys should somehow be penalized thereby. The Copleys not only timely raised the issue of prospective versus retroactive application in their Plaintiffs-Appellants' Brief but cited therein every published decision holding that tolling statutes in violation of the Commerce Clause would be given prospective application only. How any failure on the part of Bendix Autolite Corporation could impact appellants herein is an unfathomable mystery. It is particularly unfathomable inasmuch as the Sixth Circuit never raised the issue in its ruling on the Copleys' appeal.

2. On and before March 3, 1984, the date the Federal District Court dismissed Heil-Quaker Corp., all applicable Commerce Clause decisions were applied retroactively. See McKinley v. Combustion Engineering, Inc., 674 F. 2d 812 (9th Cir. 1982) and Walter P. Coons v. American Honda Motor Co., Inc., 94 N.J. 307, 463 A. 2d 921 (1983).

3. After March 3, 1984, the date the Federal District court dismissed Heil-Quaker Corp., all of the applicable Commerce Clause decisions (with the exception of one decision) were applied prospectively. See Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A.

2d 763 (1984), Love v. Johns-Manville Canada, Inc., 609 F. Supp. 1457 (D.N.J. 1985) and Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3d Cir. 1986).

The one case in which a retrospective application was applied, Cohn v. G. D. Searle & Co., 598 F. Supp. 965, (D. N.J. 1984), was reversed in Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986).

D. **Appellee's reliance on Griffith v. Kentucky, 55 U.S.L.W. 4089 (1987) is misplaced. Griffith explicitly confined itself to criminal cases. Id. at 4092.**

The only circuit court decision confronting the identical issue in a civil case held:

> [T]here can be no disputing that the Chevron test is generally applicable to issues of retroactivity, at least in civil cases.
>
> ...where the Constitution is held to immunize certain conduct from criminal punishment, as under the self-incrimination clause of the Fifth Amendment, such a holding necessarily operates retroactively. That principle has no applicability here. Cohn v. G. D. Searle & Co., 784 F. 2d 460, 466 (3rd Cir. 1986) (emphasis added)

If the Supreme Court of the United States were inclined to give any weight to the assertion that the rationale of Griffith is applicable here, one more compelling reason for plenary review is presented. Applying the Griffith rationale to civil cases would represent a dramatic departure from present law. See e.g. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986), Love v. Johns-Manville

Canada, Inc., 609 F. Supp. 1457 (D. N.J. 1985), Walter P. Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A. 2d 763 (1984).

II. PETITIONERS' REPLY BRIEF

For the sake of brevity and simplicity, all reference to the private cause of action created pursuant to 15 U.S.C. Section 2072 will be referred to herein simply as the "statutory action."

A. Honeywell, Inc.'s (Honeywell) contention that Petitioners' "statutory action" is moot is (1) utterly without merit; and (2) improperly argued in response to the petition.

1.

Honeywell's argument is without merit because the Sixth Circuit never addressed the statute of limitation

issue as applied to Petitioners' "statutory action." The Sixth Circuit never addressed the statute of limitations question because it decided the threshold issue in favor of Respondent, Honeywell. The threshold question was whether Honeywell's failure to disclose a known product hazard created a private cause of action by virtue of 15 U.S.C. Section 2072.

If the Copleys prevail on the threshold issue, they would then be entitled to review (either by the Supreme Court of the United States or by the Sixth Circuit on remand) of their contention that no applicable statute of limitations bars their "statutory action." One example illustrates the point. One of the elements of any cause of action asserted pursuant to 15 U.S.C.

Section 2072 is a knowing failure to disclose a substantial product hazard. Therefore, Petitioners contend that the limitations period for this federally-created cause of action does not even begin to run until there is a disclosure. And this, of course, is a federal question. See e.g. Jones v. TransOhio Savings Assn., 747 F. 2d 1037, 1041 (6th Cir. 1984). Clearly, the Copleys' appeal is not moot.

2.

Honeywell's argument is not an appropriate response to the petition. The issue is whether or not the question is important enough to be reviewed by the Supreme Court of the United States.

Honeywell's response, in effect, asks the Court to (a) make a decision on the merits of the secondary issue (i.e. what if any statute of limitation defense will be available to Honeywell if the Copleys are entitled to assert a cause of action pursuant to 15 U.S.C. Section 2072); (b) rule (without the benefit of briefs or argument) in Honeywell's favor on this secondary issue; and (c) then deny review of the threshold issue based upon the favorable ruling for Respondents on the secondary issue.

B. **Honeywell suggests that the Supreme Court of the United States ignore the admitted conflict between the Minnesota Supreme Court on the one hand and the Eighth and Sixth Circuits**

on the other hand in the hope that doing so will eventually lead to a uniform rule without the necessity of any review by the Supreme Court of the United States. The argument should be rejected for at least two reasons:

1. The decisions that Honeywell suggests will evolve into a uniform rule represent a distinct minority view. Respondent's brief admits that the majority of federal courts have ruled otherwise. Therefore, there is little or no likelihood that a uniform rule will emerge from the two circuit court decisions.

2. The issue significantly impacts public safety and for that reason alone should not be delayed.

CONCLUSION

None of the responsive briefs dispute the following compelling reasons for review by the Supreme Court of the United States. The decision of the Sixth Circuit gives rise to:

1. An issue which the Supreme Court of the United States has already declared to be substantial. G. D. Searle & Company v. Cohn, 455 U.S. 404 (1982). Because the question is raised by way of an appeal, the Court must make a merit decision. It should be made with deliberation.

2. A Rule 17.1(a)[1] conflict (between two federal courts of appeal) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986).

3. A Rule 17.1(b) conflict (between a state court of last resort and a federal court of appeals) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Walter P. Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A. 2d 763 (1984).

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[1] All references to Rule 17 are to Rules of the United States Supreme Court, Rule 17 (1980).

4. A Rule 17.1(b) conflict (between a state court of last resort and a federal court of appeals) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Swenson v. The Emerson Electric Company, 374 N.W. 2d 690 (Minn. 1985).

The May 20, 1987 decision of the Sixth Circuit presents multiple issues, all of which uniquely meet well-defined criteria for review by the Supreme Court of the United States. By reviewing one lower court decision, the Supreme Court of the United States would resolve these multiple issues.

It is respectfully submitted that a plenary review should be granted and a writ should issue to the Sixth Circuit.

Respectfully submitted,

James T. Murray, Counsel of Record
Appellants and Petitioners